BRIEF IN SUPPORT OF PETITION.

(a) The Circuit Court of Appeals held, that even though the liability of Eastern Trails and Safeway Trails under the contract alleged was joint, they did not have a "joint interest" as defendants within the meaning of Rule 19. It is respectfully submitted that this was error.

In the opinion of Judge Swan (R. 235) the following statement is made with respect to non-joinder of Eastern Trails as defendant:

> "* * * we shall assume with the district court that the contract made them only joint obligors * * * However, we do not believe that Rule 19(b) required Eastern to be made a party. The condition of its applicability is that the absent party is a necessary party in order that complete relief may be accorded between those already parties * * *"

Judge Swan erred in thinking that non-joinder of Eastern was based only upon Rule 19(b). On the contrary, it was based principally upon Rule 19(a) although Rule 19(b) does furnish additional grounds for such joinder. Rule 19(a) unqualifiedly states that "persons having a joint interest shall" (not may) "be made parties and be joined on the same side as plaintiffs or defendants." This is a clear and positive requirement of plaintiff as a condition precedent to the filing of his action, and as found by the District Court (R. 212-213). The only condition to be met in making Rule 19(a) applicable is that the parties have a "joint interest". This the District Court found with respect to Safeway Trails and Eastern Trails and the Circuit Court has assumed it to be true (R. 235).

Rule 19(b) is more liberal than Rule 19(a) in that it unequivocally requires the Court to make those persons parties who "ought to be parties" even though they are not indispensable. All that is necessary for this requirement to be-

come applicable is that it appear that Eastern "ought" to be a party if "complete relief" is to be accorded "between those already parties." As to persons who "ought" to be parties, Rule 19(b) says that "the court *shall*" (not may) "order them summoned to appear in the action" if the absent party is subject to the jurisdiction of the court as to both service of process and venue, as in the case of Eastern Trails and if such joinder does not deprive the court of jurisdiction of the parties before it. No one has contended in these proceedings that joinder of Eastern Trails would oust the court of jurisdiction over petitioner or respondent, nor would such be the case.

In the above excerpt from Judge Swan's opinion, he, in effect, states that the primary consideration in requiring joinder of parties is in order that "complete relief" be accorded "between those already parties." However, complete relief to plaintiff, as granted by Judge Swan, is not complete relief to Safeway Trails, who was as much "already a party" as plaintiff, unless he considers that Safeway Trails is afforded complete relief by being held solely liable for the debts of a third party which, if the corporate fiction be penetrated, is substantially identical with the plaintiff. The defendant requested the plaintiff to name Eastern Trails as a defendant, but the plaintiff naturally declined to do so in view of the fact that Eastern Trails is controlled by the plaintiff and is owned by the plaintiff to the extent of one thousand (1,000) shares of a total of 1,100 shares of its stock (R. 25, 34). In the circumstances, Eastern Trails could not have been successfully brought in as a third party defendant. While Rule 14 permits a defendant to implead a third party as defendant, such action is merely permissive and not of right. As stated in Volume 1 of Moore's Federal Practice, at pages 743 and 748 (See also 1942 Supplement, pgs. 687-688):

"The third party defendant does not, merely by the impleader, become an original defendant. The rule states that the plaintiff may amend his pleadings to assert a claim against the impleaded party under certain circumstances; but it does not compel him to proceed against the impleaded party."

See also *Crim* v. *Lumbermen's Mutual Casualty Company*, 26 F. Supp. 715. In the case of *Satink* v. *Holland Tp. et al.* (*Lehigh Valley R. Co. et al., Third Party Defendants*), 31 F. Supp. 229, it was held:

"Where a third party defendant is brought in on the ground that he is primarily liable to the plaintiff, but the latter declines to amend his complaint so as to ask for relief against the third party defendant, the order granting leave to bring in the third party should be vacated."

By the failure of the plaintiff to join Eastern, this defendant not only is deprived of having the benefit of any defenses that could have been asserted by Eastern to this claim, but is also put to the necessity of filing a separate suit, when all rights could have been litigated in one action.

It was the intention in adopting the Federal Rules of Civil Procedure to avoid, if possible, a multiplicity of suits. As was stated in Volume 2 of Moore's Federal Practice, page 2143:

"Under the common law rules joint obligees were indispensable parties; joint obligors were not but had to be made parties defendant if subject to the jurisdiction of the Court."

citing in support thereof *Camp* v. *Gress*, 250 U. S. 308, 39 Sup. Ct. 478, 63 L. Ed. 997, and *Leyden* v. *Owen*, 150 Mo. App. 102, 129 S. W. 984. The author continues with the observation that

"The same rule would now hold good."

See also Volume 2 of Moore's Federal Practice, page 2160.

This appears to be recognized in the opinion of Judge Clark (R. 239), since the failure to join Eastern is referred to as a "defect," but in that opinion it is said that enforcement of the Rule should be denied because the Judge of the District Court was "overpersuaded" to hold that Eastern was "indispensable." It is respectfully submitted that the District Court held that Eastern Trails had a "joint interest" with Safeway Trails and was a "necessary party" and that it did so not from persuasion but from its intimate knowledge of the evidence gained at the trial to which the learned judges of the Circuit Court of Appeals did not have first hand access. It is urged that a finding by the District Court upon its intimate knowledge of the evidence that parties have a "joint interest," which is the condition of applicability of rule 19(a), or that parties "ought" to be parties, which is the condition of applicability of rule 19(b), should not be disturbed unless contrary evidence in the record is so overwhelming as to make it obvious that such findings were clearly erroneous.

What the Circuit Court has done has been to nullify both Rule 19(a) and 19(b). It is respectfully submitted that the Circuit Court of Appeals has, in so construing Rule 19, decided an important question of Federal law which has not been but should be settled by this Court, and has in its decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(b) The contract in suit is a contract to assume the indebtedness of another corporation. Clearly, this was not a transaction in the ordinary course of the corporation's business. If it had been sought to accomplish this

purpose by merger of the two corporations, it would have required a vote of at least a majority of the stockholders of the defendant at a meeting duly called for that purpose; it clearly is a contract of a kind which required action at least by the board of directors. As was stated in Volume 5 of Fletcher Cyc. of Corporations, page 352:

> "The directors or trustees of a corporation are vested with its management, not as individuals, but as a board, and, as a general rule, they cannot act so as to bind the corporation only when they act as a board and at a legal meeting; and the acts of the majority of the board as individuals and other than at a meeting are ordinarily ineffective. It follows that the director or trustee of a corporation is not individually the agent of the corporation and has no power individually to bind it by any contract or to act for the corporation, even though he owns a large majority or portion of the corporate stock."

To the same effect see 13 Am. Jur. 909. In the case of *Union National Bank* v. *State National Bank,* 155 Mo. 955, 55 S. W. 989, 78 Am. St. Rep. 560, it was held:

> "The fact that the president of the corporation owned the entire capital stock of the corporation does not authorize him to execute a corporation mortgage without the action of the directors."

And in the case of *Kessell* v. *Murray,* 196 N. W. 591, 33 A. L. R. 1351, it was held:

> "Directors are without authority to act in representative capacity except as a board of directors."

In this case there never was a formal meeting of the board of directors of the defendant in which any action was taken to authorize or ratify the agreement of October 22, 1940. As stated in 13 Am. Jur., page 909:

> "The authority of directors or trustees is conferred upon them as a board, and they can bind the corpora-

tion only by acting together as a board. A majority of them in their individual names cannot act for the board itself and bind the corporation. In order to exercise their powers they must meet so that they may hear each other's views, deliberate, and then decide. They must act as an official body."

See also *Schwartz* v. *United Merchants & Manufacturers*, 72 Fed. 2d 256, *Tabenhouse* v. *International Oxygen Company*, 74 Fed. 2d 748, *Jackson* v. *County Trust Company of Maryland*, 176 Md. 505, 6 Atl. 2d 380.

There was no evidence of ratification. All of the acts relied upon by plaintiff as evidence of ratification were the acts of individuals for their own benefit which Safeway neither enjoyed nor had power to prevent. As stated in *Farmers State Bank* v. *Haun*, 30 Wyo. 322, 222, Pac. 45:

> "Ratification is impossible unless the party has a real choice to ratify or not to ratify."

The defendant received no benefit from this agreement, but any benefit that may have been derived was for the individuals and not the corporation. As was stated in *Franco-Texas Land Company* v. *McCormick*, 85 Tex. 416, 23 S. W. 123, 34 A. S. R. 815:

> "Of course this rule (of ratifying by retaining benefits) does not apply unless the money or property is received by the corporation, or appropriated to its use through some corporate agency."

See also Volume 2, Fletcher Cyc. of Corporations, page 832.

In *Brinson* v. *Mills Supply Company, Inc.*, *supra*, it was held:

> "That the rule does not apply where no benefit results from transaction or where corporation receives benefit from separate transaction."

It is contended that in the cases which hold

> "A corporation by accepting the benefits of a contract of guaranty within its implied powers and made by its president for it but without authority thereby ratifies it."

as stated in the case of *Squaw Gulch Mining & Milling Co. v. Knollberg,* 286 Pac. 822, deal with those cases in which the president or directors act "within their implied powers". In the instant case, as has been hereinbefore stated, the contract was not only unauthorized, but not within the implied powers of the individuals who attempted to make it.

(c) The condition with respect to the audit was an express condition. The law has no concern as to whether its nonfulfillment was or was not of practical importance for the defendant can be bound only so far as it has consented to be.

Restatement of the Law of Contracts, Sec. 395; Williston on Contracts, Revised Ed., Sec. 1970.

There was no evidence of waiver. No act whatever of Safeway manifesting any intention to stand upon the contract was proved after the date of the discovery of the impossibility of making the audit.

The audit was necessary to ascertain the extent of the joint obligation the defendant was expected to assume. Can it be said that defendant intended to assume jointly with Eastern the latter's obligations before such an audit was made by a certified public accountant? Could defendant have known all of the facts without such audit so that it can be said the corporation ratified the unauthorized acts of the individuals? As stated in Volume 2 of Fletcher Cyc. of Corporations, page 838:

> "But it is essential to implied ratification from acceptance and retention of benefits that it and the ac-

ceptance of the benefits be with knowledge of all the material facts.''

See also *Brinson* v. *Mills Supply Company, Inc.*, 219 N. C. 505, 14 S. E. 2d 509.

Judge Clark recognized (R. 238-9) that

> "It was a part of the agreements at the basis of this action that Eastern was to be merged in defendant."

It is earnestly contended that the defendant could not proceed with such merger until an audit had been made so that Safeway could learn the extent of the obligation to be assumed.

Upon these questions of substantive law, it is respectfully submitted that the Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

Louis B. Arnold,
Transportation Bldg.,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
Olcott, Havens, Wandless & Stitt,
70 *Pine Street,*
New York, New York.